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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1387

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PETITIONER
VS.
COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN D. AMOS
ALFRED J. LEMLEY
First National Bank Building
Fairmont, West Virginia 26554

FREDERIC R. STEELE
Deveny Building
Fairmont, West Virginia 26554

Counsel for Respondent

Of Counsel:
FURBEE, AMOS, WEBB &
CRITCHFIELD
Attorneys at Law
First National Bank Building
Fairmont, West Virginia 26554

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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The Respondent, Community Bank and Trust, N.A., respectfully prays that the petition for a writ of certiorari filed by Monongahela Appliance Company to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on January 2, 1976, be denied.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of West Virginia will be found in Appendix B to the Petitioner's Petition at 3a-8a and is reported at 393 F. Supp. 1226. The opinion of the Court of Appeals is not yet reported but is found in Appendix A to the Petition at 1a-2a.

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JURISDICTION

Counsel for the Respondent accepts the jurisdiction statement of counsel for Petitioner.

COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent believes that the only pertinent issue presented by the statement of facts agreed to below is as follows:

> Do the provisions of 12 U.S.C. §85 afford national banks the right to charge as much interest as is chargeable by state banks under its local law?

Counsel for Respondent firmly believe that the authorities hereinafter cited clearly answer the above question in the affirmative and that such answer is dispositive of the questions posed by the Petitioner and therefore the Petition must be denied.

STATEMENT OF CASE

Counsel for the Respondent will accept the Petitioner's statement of facts as set forth in the first paragraph at page 2 of its Petition.

The remaining portions of the Petitioner's statement are not considered by the respondent as a statement of facts pertinent to the case but argument which will be replied to below.

The Court should deny the petition for a writ of certiorari for reason that there is no conflict in the decisions of the United States Courts of Appeals and all of the general law of the United States and of the state courts on the issue presented herein holds contrary to the contention of Petitioner.

ARGUMENT

Respondent's position is that it, as a national banking association operating in the State of West Virginia, is permitted under 12 U.S.C. §85 to charge any interest allowed by the statutory laws of West Virginia which set forth the state's limitations on usury; that it is permitted the same competitive opportunities and may charge the same rate of interest allowed to state chartered banks in West Virginia; that West Virginia Code 47-6-10 (i.e., "No corporation shall interpose the defense of usury. . . .") creates an exception to the numerical usury rate which exception is available to it as well as to state chartered banks, and that the interest rate charged Petitioner was "interest at the rate allowed by the laws of the State" under 12 U.S.C. §85.

I. Corporations Are Exceptions to the Operation of the Usury Laws in West Virginia

West Virginia Code 47-6-10 has been cited under its former Code reference by the Supreme Court of Appeals of West Virginia in only one case wherein it stated:

> In the first place no question of usury can arise in this case because *incorporate companies are exceptions from the operation of the usury laws.* Code, chapter 57, section 38, page 337. (Emphasis Added) *B. and O. R. R. v. Wilson,* 2 W. Va. 528, 555 (1868).

In *In Re Raw Material Corporation,* 22 F.2d 920 (2d Cir. 1927), Judge Hand spoke in almost precisely the same language of the West Virginia court:

> . . . . The New York statute provides that no corporation shall interpose the defense of usury,

> *and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Id.* at 922. (Emphasis Added)

Accordingly, under the statutory law of West Virginia, Code 47-6-10, the Petitioner cannot raise the issue of usury defensively in any suit or proceeding at law in West Virginia.

II. A Corporation May Not Sue A National Bank for A Statutory Penalty for Usurious Interest if the Corporation Is by Statute Precluded From Asserting the Defense of Usury

Since the Petitioner, when sued, cannot interpose the defense of usury, it may not bring an affirmative action to invalidate the interest which it had contracted to pay and recover the statutory penalty provided by laws for violation of the usury statute. Respondent can find no other West Virginia judicial interpretation of Code 47-6-10 but courts of other states have held consistently that where the state law denies the defense of usury to corporations it also denies to the corporation any benefit of the usury laws when the corporation seeks affirmative relief.

It is "Horn Book Law" that:

> A corporate borrower may not sue for a statutory penalty if corporations are, by statute, precluded from asserting the defense of usury. 45 *Am. Jur.* 2d, *Interest and Usury,* §319, p. 244.
>
> The acts denying the defense of usury to corporations have been construed to deny to them also the benefit of the usury laws when they are seeking affirmative relief. 91 C.J.S., *Usury,* §74, p. 652.

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This rule has been called the "shield" and "sword" theory; that is, when a statute provides that a corporation shall not interpose the defense of usury, it bars the corporation from claiming usury as a "shield" to protect it from actions to recover usurious interest, and it bars the corporation from affirmatively using usury as a "sword" to recover a statutory penalty for violation of usury statutes.

In the United States the exception to the applicability of usury provisions, that a corporate borrower may not sue for a statutory penalty if the corporation is by statute precluded from asserting the defense of usury is one of long-standing and general application, and is supported, to the best of Respondent's knowledge, *by all existing judicial decisions.* There is no conflict in the Circuit Courts of Appeals on this point. The holdings are of such general application that it is easy to see why no corporation in West Virginia has sought to use the usury statute as a "sword" when it cannot use it as a "shield."

The following are excerpts from cases interpreting the usury laws of the states of Wisconsin, Pennsylvania, Michigan, New York, and Minnesota, all of which support this proposition.

WISCONSIN: *Country Motors, Inc., v. Friendly Finance Corp.,* 13 Wis. 2d 475, 109 N.W.2d 137, 140 (1961)

It would then seem absurd to permit a lender to collect principal and agreed interest from a corporation, but to permit the corporation to recover from the lender three times the amount by which the interest exceeded the statutory rate. *While the words of the clause speak only of denying a defense, we conclude that they imply the denial of an affirmative right of action based upon the same facts.* (Emphasis Added)

PENNSYLVANIA: *Municipal Leasing Systems, Inc., v. Northamption National Bank of Easton,* 382 F. Supp. 986 (E.D.Pa. 1974)

Section 313 of the Business Corporation Law of Pennsylvania provides as follows:

No business corporation shall plead or set up usury, or the taking of more than six per cent interest, as a defense to any action brought against it to recover damages on, or to enforce payment of, or to enforce any other remedy on, any mortgage, bond, note, or other obligation executed or effected by the corporation.

The Court stated at page 970:

A Pennsylvania business corporation may not assert a defense of usury nor maintain an action in either Pennsylvania state courts or a federal court sitting in Pennsylvania to recover usurious interest or any statutory penalty provided for usurious loans.

MICHIGAN: *Miller v. Reid,* 243 Mich. 694, 220 N.W. 748, 749 (1928)

[1] The Legislature, by Act No. 335, Public Acts 1927, pt. 2, c. 1, §1, provided that:

> No corporation shall interpose the defense of usury to any cause of action hereafter arising.

Statutes of similar import exist in some other states, and have been held to be remedial in nature and entitled to a liberal construction. *Rosa v. Butterfield,* 33 N.Y. 665, 669.

As stated in a note in 14 Ann. Cas. 115:

> However, the effect of the act is not limited to the case of a corporation made a party defendant to an action, and setting up usury as a defense thereto. The Courts have interpreted the word 'defense' to mean 'any position or attitude in an action in which a corporation seeks to avoid its own contract by showing that it is usurious.' This interpretation was adopted because the contrary construction would have defeated all the beneficent purposes of the statute. (Citation Omitted).

NEW YORK: *Butterworth v. W. & J. O'Brien,* 23 N.Y. 275 (1858)

The language is general and unqualified. It takes away the defense—the *objection* of usury. It strikes it out of existence, and the ordinary consequences must follow. It not only disallows the defense, but it forbids it to be used in any way defensively; that is, to accomplish the same object by affirmative action, as, for example in a proceed-

ing to vacate or set aside a contract, as would be accomplished by strictly defensive action, as for example, in setting up the usury in an answer to an action upon the contract. If it goes this length, and it was rather conceded on the argument that it did, then I think it goes still further, and forbids not only a defense to an action for the usury or usurious premium, but forbids an action to recover back the usurious premium. The money borrowed, the legal interest, and the usurious premium are all mingled together in one transaction, form part of one single and indivisible contract, and when the statute says the defense of usury shall not be interposed to it, I think it means to each and every part of it—no one part more than another.

MINNESOTA: *Bickel Optical Laboratories, Inc. v. The Marquette National Bank of Minneapolis,* 336 F. Supp. 1368 (Minn. 1971)

Plaintiff contended that it was not asserting usury as a defense to payment under the Minnesota statute which provided that no corporation shall interpose the defense of usury in any action, but was seeking affirmatively to affect a recovery of damages resulting from the seizure of funds available from a claimed usurious loan.

The Court stated at page 1370:

. . . the above statute has no real significance unless in effect it removes or repeals usury laws insofar as loans to corporations are concerned. A number of cases considering similar or identical situations from other jurisdictions have so held, *Country Motors, Inc. v. Friendly Finance Corp.,* 13 Wis.2d 475, 109 N.W. 2d 137 (1961); *Curtis v.*

> *Leavitt,* 15 N.Y. 9 (1857); *Rosa v. Butterfield,* 33 N.Y. 665 (1865); *MacQuoid v. Queens Estates,* 143 App. Div. 134, 127 N.Y.S. 867 (1911); *Penrose v. Canton Nat. Bank,* 147 Md. 208, 127 A. 852 (1925). The Court concurs in those holdings. * * *

At page 16 of the Petition, opposing counsel characterizes as "untenable" the position of the Respondent in the Courts below, that by the adoption of W. Va. Code 47-6-10 West Virginia adopted the case law of New York construing its similar statute. Counsel for Petitioner emphasizes the chronology of events subsequent to the New York statute passed in *1850,* i.e., adoption of similar language in passing what is now West Virginia Code 47-6-10 in *1855* by the Virginia Assembly and the *Butterworth* decision in *1858.* While the rule of statutory construction stated in 82 C.J.S. *Statutes* §372 and cited in Petitioner's brief at page 17 may be useful, *it is not without exception.* 82 C.J.S. *Statutes* §373b at page 867 provides that while construction of a statute by the court of the original state after the adoption by another state has no controlling effect, *such construction may be strongly persuasive,* citing *Allen v. Raleigh-Wyoming Mining Co.,* 117 W.Va. 631, 186 S.E. 612, (1936). In the *Allen* case the West Virginia court was called upon to construe certain language in the West Virginia Workmen's Compensation Act of *1913.* The West Virginia act substantially followed the act of the State of Washington enacted in *1911.* In *1913* the State of Oregon adopted its compensation act. A portion thereof was construed by the Oregon Supreme Court in *1916.* In *1922* the Supreme Court of Washington adopted the definition of certain language laid down by the Supreme Court of Oregon in *1916.* In *Allen, supra.* the West Virginia Supreme Court

discussed the above statutory history of the three states, and, in construing the identical language, i.e., *"the deliberate intention"*, of the West Virginia Statute, adopted the construction placed upon said language by the courts of Oregon and Washington and at page 636 of the West Virginia Report, the court said:

> In construing statutes adopted from another state, the judicial interpretation already placed on that statute by the highest judicial tribunal of such state will usually be adopted. *Nimick & Co. v. Mingo Iron Works Co.,* 25 W. Va. 184; *Rose v. Public Service Comm.,* 75 W. Va. 1, 83 S.E. 85, L.R.A. 1915B, 358, Ann. Cas. 1918A, 700; *Kirk v. Firemen's Ins. Co.,* 107, W. Va. 666, 150 S.E. 2, Subsequent decisions, however, have no controlling effect *but are highly persuasive and entitled to great consideration,* 25 R.C.L. 1073, sec. 295; 59 C.J. 1071, sec. 629; Annotation, Ann. Cas. 1917B, 651, 656. (Emphasis Added)

In the present case, Respondent submits that the United States District Court for the Northern District of West Virginia, as affirmed by the United States Court of Appeals for the Fourth Circuit, performed its duty in accordance with *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, i.e., and made an informed prediction based upon 12 U.S.C. §85, W. Va. Code 47-6-10, *B. and O. R. R. v. Wilson, supra,* and all other statutory and decisional law on the subject and reached the unassailable conclusion that the Supreme Court of Appeals of West Virginia would interpret W. Va. Code 47-6-10 to preclude recovery by the Petitioner.

It is therefore Respondent's position that West Virginia Code 47-6-10, on its face, supported by Court decisions of other states interpreting similar usury statutes from which West Virginia law was adopted, and the well-established general law on the subject, precludes a West Virginia corporate borrower from suing a national bank for a statutory usury penalty just as it precludes a corporation from asserting usury as a defense.

III. The Intent of 12 U.S.C. §85 Is to Insure That National Banks Shall Be Competitive With State Banks as to Interest Rates

In the United States Court of Appeals for the Fourth Circuit counsel for the Petitioner in its Brief at page 13 conceded that:

> * * * Monongahela concedes that the West Virginia statute, Code 47-6-10, * * *, effectively not only bars usury as a defense to corporations, that is, as a shield, but as an offensive weapon, that is, as a sword, in state court cases not involving national banks.

Petitioner thereby agreed with the conclusions of the District Court concerning the interpretation of the West Virginia Statute and the general law that a corporate borrower may not sue for a statutory penalty if corporations are, by statute, precluded from asserting the defense of usury insofar as *state banks are concerned,* but contends that the National Bank Act 12 U.S.C. §85, created an exception which *denies to national banks the benefits of the general law permitted a state bank.* This contention would place a national bank in West Virginia

in a position inferior to that of state banks and thereby defeat the intent of Congress to give national banks "at least equal advantage."

Petitioner cites no case or statutory authority for its contention, and in fact, all decisions on this matter deny the validity of such an argument. In *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966) *cert. den.* 385 U.S. 948, a case remarkably similar to the case at hand, the Ninth Circuit rejected an argument similar to the one presented by Petitioner.

Syllabus point number 2 of *Hiatt* states the following:

> Under federal statute relating to the right of national bank to charge as much interest as is chargeable by the state's banks under its local law there is a congressional intent that competitive opportunities of the national bank operating in a certain state should not be impeded by congressional limitations or interest charges which are more restrictive than state limitations imposed upon the state's banks. 12 U.S.C.A. §85

In its opinion in *Hiatt,* the Court rejected the arguments of Appellant, arguments similar to those of Petitioner herein, and discussed several cases as authority for its ruling:

> Appellant urges that 'no rate is fixed by the laws of the State' and that, hence, appellee was forbidden to collect an interest charge in excess of 10 percent per annum, the maximum chargeable rate permissible to most lenders under California law.
>
> * * *

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Argument

Appellant's contentions are ingenious and technically forceful. They also appeal to an equitable sense offended by oppressively exorbitant charges; nevertheless, we are convinced that they must be rejected. Considering the federal statute in its entirety, we clearly see a congressional intent that the competitive opportunities of a national bank operating in a certain state should not be impeded by congressional limitations on interest charges which are more restrictive than state limitations imposed upon the state's banks. This intent has twice been emphasized by the Supreme Court. As early as 1874, it was written,

'The defendant [bank] is not to be subjected to a penalty [for usurious charges] unless the words of the statute precisely impose it.' (Emphasis Added)

* * *

It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected that they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, *whatever those rates might be,* which were allowed to similar State institutions. (Emphasis Added.) *Tiffany v. National Bank of Missouri,* 18 Wall. (85 U.S.) 409, 410, 412, 21 L.Ed. 862 (1873).

In *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882 (1900), the Court wrote,

> The meaning of these provisions [in the federal statute] is unmistakeable. A national bank may charge interest at the rate *allowed* by the laws of the state or territory where it is located; and equality is carefully secured with local banks. (Emphasis in original.)
>
> * * *The intention of the national law is to adopt the state law, and permit to national banks what the state allows to its citizens *and to the banks organized by it.* (Emphasis Added.) 177 U.S. at 555, 20 S.Ct. at 735. (Citations omitted.)

We cannot avoid the plain direction of the foregoing expressions of the Supreme Court. In *Daggs,* the defendant national bank was located in Arizona, where the state law provided that 'Parties may agree in writing for the payment of any rate of interest whatever* * *.' 177 U.S. at 554, 20 S.Ct. at 734.

There, as here, it was contended that the Arizona statute *fixed* no minimum *rate* of interest for Arizona state banks and that it followed that the national bank was prohibited from charging a rate in excess of the rate specified in the federal statute. The contention was rejected. The silence of California's legislature produces the same effect in California as that resulting in Arizona from the Arizona statute authorizing lenders and borrowers to 'agree in writing for the payment of any rate of interest whatever'. This being true, there is no

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distinction sufficient to justify a conclusion here which would oppose that reached by the Supreme Court in its analysis of the federally prescribed permissions and restrictions as affected by the terms of the Arizona statute.

No specific maximum rates were 'fixed' by the Arizona statute, but in true effect, the law in both Arizona and California has 'fixed' the rates for state banks in two jurisdictions as without limitation except such as may be established by agreements between the banks of the two states and those who borrow from them.

Our conclusion must necessarily be that the language of 12 U.S.C. §85 which reads 'any association may* * *charge* * *interest at the rate allowed by the laws of the State* * *where the bank is located* * *' should be construed as meaning that a national association located in a particular state may charge as much interest as may be legally charged by the state's banks under the state's existing law.

In *McNellis v. Merchants National Bank & Trust Co. of Syracuse,* 390 F.2d 239, 241 (2nd Cir. 1968), the Court reached the same conclusion that the Court did in *Hiatt*:

The New York law of usury is controlling as to national bank Merchants because 12 U.S.C. §85 *so provides.* Under New York law, the maximum rate of interest that generally may be charged is six per cent per year. (Citing statutes) * * *Nevertheless, for many years corporations in New York have been barred from claiming usury. The General Obligations Law §5-521 now provides: 'No corporation

shall hereafter interpose the defense of usury in any action.* * *' *Therefore, if the building loan here was to the Corporation, it cannot recover the payments of eight and one-half per cent interest as usurious;* * *** (Emphasis Added).

In *Meadow Brook National Bank v. Recile,* 302 F. Supp. 62, 74 (E.D. La. 1969) the District Court reached the same conclusion, that is:

> * * *in interpreting an act of Congress, we must attempt to implement the congressional purpose in enacting the statute. In fact, in interpreting §85 the courts have strenuously endeavored to effectuate its purpose despite the fact that the language of that section may not clearly and readily yield the result intended by Congress. See, for example, *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), which is such a case and which relies on the purpose of the statute to reach a result not obviously supported by the language of the section. The purpose of §85 was to place the national banks on an equal footing with the state banks so they would *not be limited by congressional restrictions in competing with state banks.* (Emphasis Added)
> *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882 (1900); *Tiffany v. National Bank of Missouri,* 85 U.S. (18 Wall.) 409, 21 L.Ed. 862 (1873).

In *Meadow Brook* at footnote number 7, on page 76 and 77 thereof the Court stated as follows:

> 7.* * **The defendants argued that the federal banking statute adopts the state law only as to the maximum rate of interest and*

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> ***does not incorporate statutes barring corporations from asserting the defense of usury. Such statutes, argued the defendants, are merely procedural. We cannot agree with this contention.*** As indicated above, the purpose of §85 was to place the national banks on an equal footing with the state banks. It would truly frustrate this purpose to refer only to the maximum rate of interest without also incorporating the exceptions thereto. To adopt the defendants' argument would result in rank discrimination against national banks, thus defeating the clear congressional intent. This we could not do. * * *If 12 U.S.C. §85 were applicable, we would reject the defendant's argument in light of the clear congressional purpose and the force of precedent.* * *This much is clear by the decision in *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), which rejected an even more cogent argument, and which held that national banks may charge as much interest as may be legally charged by the state's banks under the state's existing law. (Emphasis Added)

The cases cited above clearly show that it was the intention of the national law, 12 U.S.C. §85, to permit to national banks what the state law allows to state banks, and that no discrimination was intended, as is contended by Petitioner, against national banks located in West Virginia.

IV. The Comptroller's Interpretive Rulings for National Banks Clearly Supports The Action of the Courts Below

The *Comptroller's Manual for National Banks* reflects the interpretation placed upon 12 U.S.C. §85 by the Federal body governing all National Banks.

The *Comptroller's Manual For National Banks, Interpretive Rulings of the Comptroller of Currency, Interest Charges and Usury,* provides as follows:

> Ruling 7.7310 Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.
>
> A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company or morris plan bank, without being so licensed.
>
> *A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.* (Emphasis Added)

In *Northway Lanes v. Hackley Union Nat. Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972) the Court said at 864:

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Argument.

> The District Court's ruling is supported by the administrative interpretations of Comptrollers of the Currency over many years. We note in passing Ruling 7.-7310, 12 C.F.R. §7.7310, 36 F.R. 17015, * * *
>
> The above interpretations, made by an office charged with the responsibility of promulgating reasonable regulations pursuant to the National Banking Act, *and supported by the legislative history of the Act and by the Supreme Court's decision in Tiffany, supra, are entitled to deference by this Court.* (Emphasis Added) See, *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143, 153, 154, 67 S.Ct. 245, 91 L.Ed. 136; *F.H.A. v. The Darlington, Inc.* 358 U.S. 84, 90, 79 S.Ct. 141, 3 L.Ed.2d 132; *Udall v. Tallman,* 380 U.S. 1, 17, 85 S.Ct. 792, 13 L.Ed.2d 616.

The interpretation placed upon 12 U.S.C. §85 is followed and relied upon by national banks to the extent that it has virtually become the "common law" of national banks. It is submitted therefore, that if the Comptroller's position would not be upheld, virtually every corporate loan made by national banks in West Virginia (as well as in each of the many other states having a state law denying the defense of usury to a corporation) would become usurious and all national banks would become subject to economically devastating penalties.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. AMOS
ALFRED J. LEMLEY
FREDERIC R. STEELE

Counsel For Respondent

Of Counsel:

FURBEE, AMOS, WEBB & CRITCHFIELD

Attorneys at Law
First National Bank Building
Fairmont, West Virginia 26554